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SUBJECT: 2008 SPECIAL 301 REVIEW - COSTA RICA

REF: A) 09 STATE 8410
B) 06 SAN JOSE 0464
C) 07 SAN JOSE 0335
D) 08 SAN JOSE 0155
E) 08 SAN JOSE 0959

SUMMARY

¶1. (U) Since last year's report (Ref D), the GOCR enacted a number of laws related to Intellectual Property Rights (IPR) as required by the Central American Free Trade Agreement (CAFTA-DR), but the success in passing new IPR legislation highlighted the country's failure to enforce existing laws. Costa Rica's Attorney General publicly and repeatedly stated that Costa Rica should use its limited investigative and prosecutorial resources to pursue violent and drug-related crimes and instructed staff prosecutors to pursue IPR cases only if they implied harm to people or the environment.

¶2. (U) Nonetheless, there was IPR progress. The Costa Rican Industrial Registry issued many more patents than in recent years. A number of Costa Rican officials received training in IPR enforcement, administration, prosecution, and customs from USPTO, DHS, WIPO, and others. The Judicial Branch, through the Judicial School, has engaged in IPR training and wants to provide more training opportunities for judges and prosecutors. Due to the CAFTA-DR-related legislative gains (which required significant political will by the executive branch), and improvements with registrations, Post recommends that Costa Rica's ranking not be lowered, and that the country remain on the Watch List for the 2009 Special 301 Report (Ref A). END SUMMARY.

IPR BACKGROUND IN COSTA RICA

¶3. (U) After a difficult and extended implementation review process, CAFTA-DR entered into force (EIF) for Costa Rica on January 1, 2009. However, entry into force did not quiet CAFTA and IPR critics. Issues related to IPR rose to the forefront of public debate during the campaign leading up to the October 7, 2007 nationwide referendum to ratify the country's participation in CAFTA-DR. Those opposed routinely spoke out against the Agreement's requirements to create effective deterrents against IPR infringement as well as protections for IPR, politicizing the issues. Opposition leaders asserted that increased penalties for IPR violators would "send students to jail for copying textbooks" and increased IPR protection would bankrupt the local social security system since it would be forced to purchase original, innovative pharmaceuticals rather than generics. The Costa Rican public ultimately rejected such arguments and approved CAFTA-DR by a slim margin, but the negative campaign created an environment where issues related to IPR remain politically controversial.

14. (U) After Costa Rica was included in the Priority Watch List in 2001, the country took the necessary steps to bring into force the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) on March 6, 2002 and May 20, 2002, respectively. Costa Rica also ratified the Patent Cooperation Treaty (PCT). Costa Rica posted incremental -- but limited -- IPR progress over the past several years (Refs B and C).

15. (SBU) Since last year's Special 301 Report, Costa Rica made all the necessary legislative reforms to comply with CAFTA-DR obligations related to IPR. In recognition of meeting CAFTA standards through legislative reforms, the United States Trade Representative (USTR) certified Costa Rican CAFTA-DR compliance in late 2008, paving the way for EIF a few weeks later. However, three technical corrections remain for legislative action by the Costa Rican national assembly. Packaged into one final piece of legislation, the corrections (Ref E) must be passed into law by January 1, 2010. Failure to do so will result in a holdback of tariff preferences on a select category of Costa Rican export products, most likely sugar. The Arias Administration is confident that the process will be completed in 2009.

. . . BUT SADDLED BY ENFORCEMENT CHALLENGES

16. (U) Despite these legislative victories, real challenges remain in effectively ensuring that the laws have an impact on the local IPR environment. Throughout 2008, Costa Rica continued to falter in enforcing its IPR laws, which criminalize counterfeiting and piracy. The country's public prosecutors have consistently demurred from prosecuting IPR cases unless they involve potential harm to people or the environment. The prosecution of IPR crimes is handled by public prosecutors in the "various crimes" divisions of the branch offices of the Attorney General's office (in which an individual was appointed with responsibility for IPR prosecution). Crimes related to IPR form only a portion of the portfolio of these prosecutors and receive little attention. Rather, the prosecutors tend to invoke "opportunity criteria" (akin to prosecutorial discretion) to avoid opening investigations into reported IPR crimes.

17. (U) The Attorney General of Costa Rica, Francisco Dall'Anese, publicly and privately reiterated that he does not support diverting limited resources to the prosecution of IPR crimes. Rather, he maintains that private companies can seek redress in civil courts or can initiate a criminal public action through private application. By this process, a private party (almost always through an attorney) files a complaint and jointly conducts the investigation and prosecution of the case with the public prosecutor. While this could be an effective means of prosecuting IPR violators, the reality is that the private sector and the prosecutor's office have yet to coordinate in a meaningful way. Likewise, the use of the civil courts to pursue private cases against IPR violators is hampered by the extreme length of time it takes to receive a civil judgment (up to 15 years) and the small monetary damages awarded.

18. (SBU) Industry and others have asked Dall'Anese to halt the nearly automatic use of opportunity criteria with IPR crimes, but he has rebuffed their calls, and is in a position to do so. The position of Attorney General in Costa Rica is entirely independent of the Costa Rican Executive and Legislative Branches. Constitutionally, the position falls under the Judiciary, but, in practice, it is almost completely autonomous. Dall'Anese was reelected to a second four year term as Attorney General in late 2007. (COMMENT: Knowledgeable local contacts tell us that Dall'Anese is unlikely to run for a third term in 2011. END COMMENT.)

19. (U) The few prosecutions that wound their way through the criminal court system over the last two years were originally started long before. In February 2008, industry successfully concluded a prosecution against a counterfeiter of apparel. As has been the case in previous successful IPR prosecutions, the judge immediately paroled the convicted counterfeiter as it was her first offense and the sentence was for less than three years. (COMMENT: No

matter the crime, judges in Costa Rica have the latitude to immediately parole first-offenders who have been sentenced to less than three years of prison. Judges generally use this power in all criminal cases when it can be applied. END COMMENT.)

AT THE BORDER: ARE THE GOODS GENUINE?

¶10. (U) Officers within the FBI-equivalent Judicial Police (OIJ) state that most counterfeit goods within Costa Rica are imported from elsewhere rather than manufactured in the country. Unfortunately, Costa Rica's Customs service continues to face difficulties in halting the flow of counterfeit goods into the country. The leadership of Customs is aware of the importance of seizing pirated goods, but most customs agents lack the necessary training to recognize counterfeits. Local industry has also expressed an interest in providing counterfeit recognition training to Customs officials.

¶11. (U) In addition, the laws regulating the filing of criminal cases can impede the seizure of pirated goods at the border. If a customs agent recognizes that a shipment contains pirated goods, the agent can order the shipment seized for 48 hours. If, at the end of that period, the holder of the IPR for the product involved has not filed a criminal complaint against the importer, the customs agent must either release the goods or file a criminal complaint. The latter action can open the agent up to personal liability through a countersuit by the importer if the criminal complaint is ultimately unsuccessful.

¶12. (U) Recent changes in the law give the customs agent ten days from seizure to file the criminal complaint, but the customs agent continues to be personally liable if the complaint is unsuccessful. Increased communication between Customs and industry would help solve this problem by providing time for the owner of the trademark or patent to file the police report. In such cases, even if the prosecutor ultimately invokes opportunity criteria and abandons his/her role in the criminal prosecution, the private party could continue the action, aided by the fact that the goods have already been seized by Customs.

COSTA RICAN PATENT OFFICE: CAPACITY BY CONTRACT

¶13. (SBU) In 2008 the Costa Rican Industrial Property (IP) Office of the National Registry finally began to address severe delays in processing patent applications. Through 2007, patent attorneys in Costa Rica related that the office had not yet begun processing patent cases first submitted in 2004 and 2005. The table below illustrates progress, although the backlog may take years to erase.

	Number of Application Approvals			
	Year 2005	2006	2007	2008
Patent	13	4	13	53
Utility Model	0	1	1	2
Industrial Model	4	3	2	21
Industrial Design	1	1	-	15
TOTAL	18	9	16	91

Source: Industrial Property Registry

The IP Office informs us that in 2008 the office completed the review of a total of 140 applications, approving the 91 shown above and rejecting 49. While new patent applications are immediately processed, there is still a backlog of about 1,200 patent applications waiting for technical review.

¶14. (U) The IP Office believes that it is on the verge of hiring five in-house patent examiners with training and experience in specific areas of science and technology. It has taken several years to create these positions. These in-house examiners will not be hired within the Civil Service structure and therefore may be paid salaries commensurate with their expertise. To date, the IP office has relied heavily on contract relationships with the Costa Rican Technical Institute and the Pharmacists Board Association to provide experts to serve as outside examiners. The IP Office will continue to use these and other outside examiners to move through

the backlog of patent applications.

¶15. (U) The World Intellectual Property Organization (WIPO) has worked closely with the Costa Rican IP Office to train employees. WIPO also offered training to officials in the judiciary that have an interest in IPR. In addition, the U.S. Embassy sent eight Costa Rican officials to the USPTO's Global Intellectual Property Academy for training.

USE/PROCUREMENT OF GOVERNMENT SOFTWARE

¶16. (U) The 2002 Executive Decree #30, 151-J, mandated that all government ministries use only legally-licensed computer software. According to this decree, each ministry was to conduct an internal audit and submit a statement of compliance no later than July 31, ¶2003. The government subsequently claimed full certification of all ministries, although there had been no independent confirmation.

COMMENT

¶17. (SBU) In general, parts of the Costa Rican government, notably the judiciary, do not yet view IPR as a tool to spur innovation. The executive branch recognizes the value of IPR enforcement and prosecution and the private sector wants judicial action on IPR cases. After making progress in IPR legislation as instituted by CAFTA-DR's entry into force, the focus of attention is now on the judiciary and how it handles cases in a CAFTA-DR compliant IPR regime.

¶18. (SBU) Therefore, based on the GOCR's progress to date in improving the country's IPR framework -- legislative reforms, political will in the executive branch, sharp increase in patent application approvals, and receptivity to training opportunities -- Post recommends that Costa Rica remain on the Watch List. This is the properly-modulated message, in our view. To lower Costa Rica's standing immediately after the GOCR finally completed its CAFTA-DR implementation obligations would be too harsh a signal. Such a move would likely be viewed as provocative by the Arias administration, which worked very hard to pass the necessary IPR legislation for CAFTA-DR EIF. This would also be counterproductive to our low-key but steady efforts to work with the GOCR and the private sector (and around the Attorney General, if necessary) to improve IPR protection.

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